SOUTH EAST ASIA FIRE BRICKS SDN. BHD. v. NEO-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION & ORS.

[O.C.J. (Abdul Hamid J.) June 18, 1975]
[Kuala Lumpur — Originating Motion No. 73 of 1974]

Administrative Law — Application for certiorari to quash award of Industrial Court — Error on face of record — Whether strike justified — Industrial Relations Act, 1967, ss. 29(3), 41 and 42 — Employment Ordinance, 1955, ss. 8, 15(2) — Trade Unions Ordinance, 1959, s. 66(1)(b).

Industrial Law — Strike — Whether legal — Reasonable excuse for absence from work — Whether strike justified — Employment Ordinance, 1955, ss. 8, 15(2) — Trade Unions Ordinance, 1959, s. 66(1)(b).

In this case there was a disagreement between the union and the applicants over non-recognition of the union. Subsequently the Minister of Labour directed the applicants to accord recognition to the union. The union then submitted its proposals for a collective agreement and invited the applicants to commence negotiations. No reply was received from the applicants and the union then complained to the Minister. The union told the applicants by letter that unless they commenced negotiations by a certain date, the union would have resort to industrial action. The workers subsequently went on strike. The applicants then issued a notice to the workers informing them that their services would be terminated if they did not resume work within a stated period. Subsequently the workers wanted to resume work but the applicants refused to accept them. The Industrial Court held that the strike was lawful and that the workers by going on strike had not terminated their contracts of service. It therefore held that the applicants were not justified in refusing to take the workers back. The applicants applied for an order of *certiorari* to quash the award of the Industrial Court.

Held: there was an error on the face of the record in this case, as though the Industrial Court had held that the strike was legal it did not consider whether there was justification for the strike so as to constitute a reasonable excuse within the meaning of section 15(2)(a) of the Employment Ordinance. The fact that the court had not considered the full effect and implications of the various factors and the relevant circumstances surrounding the strike, showed that they had erred in law. The error apparent on the face of the record justified interference by the court.

Cases referred to:-

(1) *Gleneagles Hotel Ltd.* v. *Wong Jue Whee & Ors.* [1956] M.L.J. 37.
(2) *Nadchatiram Realties (1960) Ltd.* v. *Raman & Ors.* [1965] 2 M.L.J. 263.
(3) *Mohamed* v. *Commissioner of Lands and Mines, Trengganu & Anor.* [1968] 1 M.L.J. 227.
(4) *R.* v. *Northumberland Compensation Appeal Tribunal* [1952] 1 All E.R. 122.
(5) *Re Gilmore's Application* [1957] 1 All E.R. 796, 808.
(6) *Syed Yakoob* v. *Radhakrisna* A.I.R. 1964 S.C. 477, 479.
(7) *State of Orissa* v. *Murlidhar* A.I.R. 1963 S.C. 404.
(8) *Dudley (Lord)* v. *Dudley* (1705) Prec. Ch. 241, 244.
(9) *Wong Mook* v. *Wong Yin & Ors.* [1948] M.L.J. 41.
(10) *Re a Solicitor* [1945] K.B. 368, 371.
(11) *Rex* v. *Archdall & Roskruge, ex parte Carrigan and Brown* (1928) 41 C.L.R. 128, 136, 137.
(12) *Glamorgan Coal Co.* v. *South Wales Miners' Federation* [1903] 2 K.B. 545.
(13) *Mogul S.S. Co.* v. *McGregor, Gow & Co. & Ors.* (1889) 23 Q.B.D. 598.
(14) *Opera House Investment Pty. Ltd.* v. *Devon Buildings Pty. Ltd.* (1936) 55 C.L.R. 110, 116.
(15) *S. Textile Mills Ltd.* v. *Workmen of Sadul Textile Mills & Anor.* A.I.R. 1958 Raj. 202.

ORIGINATING MOTION.

R. R. Chelliah (*S. Kulasegaran* with him) for the applicants.

D. P. Xavier (*G. Vadiveloo* with him) for the respondents.

Abdul Hamid J.: The applicants, South East Asia Fire Bricks Sendirian Berhad is seeking, by writ of *certiorari*, to remove into this court for purposes of it being quashed Industrial Court Award No. 39/74 made on August 8, 1974 (Case No. 15/74).

The applicants are relying on the grounds set out in the affidavit of Tan Kim Seng, Manager of the applicant company. Encik R. R. Chelliah with Encik S. Kulasegaran counsel for the applicants, however, proceeded only on the grounds that the Industrial Court erred in law when the court held —

(1) That the workers did not terminate their contracts of service;
(2) That they were not bound by the decision of Willan C.J.;
(3) That the subsequent cases — *The Gleneagles Hotel Singapore*[1] and *Nadchatiram Realties (1960) Ltd.* v. *Raman & Others*[2] were decided in different context;
(4) That after dismissing the said workers the company in refusing the workers to go back on February 16, 1974 had declared a lock-out; and
(5) That the company did not come within the meaning of public utility service and the strike was legal.

Basically the facts are not in dispute. Briefly, they are as follows — A disagreement arose in 1973 between the first respondent (I shall call "the Union") and the applicants over non-recognition of the union. By letter dated February 21, 1973, the Minister of Labour directed the applicants to accord recognition. On October 2, 1973, the union submitted its proposals for a collective agreement on terms and conditions of employment of its workers and invited the applicants to commence negotiations. The union did not receive any acknowledgment. A reminder was sent but no response or acknowledgment was received. The union wrote to the Minister of Labour and Man Power complaining about the adamant attitude of the applicants and seeking his good offices for early commencement of the negotiations.

By letter dated December 31, 1973, the union told the applicants that unless they commenced negotiations by January 14, 1973, the union would have to resort to industrial action and there would be complete cessation of work. On the same date, the Pengarah Hal Ehwal Perhubungan Perusahaan (Selangor dan Pahang) of the Labour Department wrote to the union requesting the union representatives to attend a meeting at his office on January 22, 1974 to discuss collective agreement proposals. The union representatives presented themselves but the applicants' representatives did not turn up. Another letter was sent by the Labour Department fixing a meeting for January 31, 1974. No meeting took place. The workers went on strike on February 4, 1974.

By reason of sub-section (7) of section 12 of the Industrial Relations Act, 1967 (I shall call "the Act") a trade dispute therefore arose.

On February 4, 1974, the day the workers went on strike, the applicants, through their solicitors, caused

notice to be issued to the striking workers informing them that their services would be terminated unless they resumed work within a period of 48 hours from that day. On February 5, 1974, the appilcants caused to be issued a further notice warning the striking employees that they should return to work within a 48 hour period. The workers did not return to work but went on strike for 12 days. On February 16, 1974, they wanted to resume work but the applicants refused to accept them.

The union contended that the notices were bad in law and the applicants' action in issuing the notices was calculated to strike terror into the hearts of the workers to break the strike, an unfair labour practice. The applicants argued that the workers wilfully refused to comply with the notices and failed to resume work and they therefore had to make arrangements for alternative labour in place of the striking workers who wilfully terminated their contracts of service.

The applicants also argued that even assuming the applicants, without justification, wilfully refused to accord recognition and commence negotiations, that by itself, could not amount to justification in law for the strike. Under the provisions of the Act, reference could be made to the Industrial Court.

In reply to the statement of the case filed by the union, the applicants maintained that the strike was motivated not by their failure to accord recognition and commence negotiations with the union, but by their transfer of eight employees to another section. Encik Chelliah did not pursue the point. Even if he did, I do not think he could have succeeded in satisfying me that the question was not otherwise one of fact. It was therefore essentially a question for the Industrial Court to determine and make its finding.

At this juncture, it seems appropriate to discuss firstly, the limits of this court's jurisdiction to issue a writ of *certiorari* in regard to the award of the Industrial Court. There are authorities to show that *certiorari* will lie to quash the order of an inferior tribunal where there is an error of law apparent on the face of the record. In India *certiorari* is issued under Article 226 of the Constitution of India. Article 226 is substantially in *pari materia* with paragraph 1 of the First Schedule, made under section 25, of the Courts of Judicature Act, 1964.

I have in the particular instant case drawn my attention to sub-section (3) of section 29 of the Act which says that "an award of the Industrial Court shall be final and conclusive, and that no award shall be challenged, appealed against, reviewed, quashed or called in question in any court of law."

The Industrial Disputes Law in Malaysia by C. P. Mills at page 203 referring to sub-section (3) of section 29 made the following observations —

"The provision that an award of the court is 'final and conclusive' will not preclude the remedy of *certiorari*; only the clearest and most explicit words will have that effect: *Mohamed* v. *Commissioner of Lands & Mines, Trengganu.*[3] It is doubtful whether the further words of this section are sufficient, especially in view of the facts that the Industrial Court is primarily an arbitral body, not a judicial one;"

In *Mohamed* v. *Commissioner of Lands and Mines, Trengganu, supra,* a Federal Court case, Ismail Khan J. giving the judgment of the Federal Court speaking of the writ of *certiorari* said at page 228 —

"The writ of *certiorari* is an ancient remedy and is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. This control over such bodies is exercised not in an appellate but in a supervisory capacity. The judgment of Denning L.J. in *R.* v. *Northumberland Compensation Appeal Tribunal*[4] contains an interesting account of the development of this procedure of *certiorari* and its application in respect of convictions by magistrates, the orders of justices in civil matters, awards of arbitrators and statutory tribunals. More use is made of such remedy especially where in the case of some of these it is provided that their decision is final."

The learned judge proceeded to quote a passage in *Re Gilmore's Application*[5] where Romer L.J. said —

"... It is not in the public interest that inferior tribunals of any kind should be ultimate arbiters on questions of law."

Ismail Khan J. then pointed out that the effect of the words that the decision of a statutory tribunal 'shall be final' was considered in that case. He went on to quote the observation of Denning L.J. in *Re Gilmore's Application, supra* at page 801 as follows —

"Do these words preclude the court of Queen's Bench from issuing a *certiorari* to bring up the decision? This is a question which we did not discuss in *R.* v. *Northumberland Compensation Appeal Tribunal* because it did not there arise. It does arise here, and on looking again into the old books I find it very well settled that the remedy by *certiorari* is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to *certiorari*'. It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made 'final', *certiorari* can still issue for excess of jurisdiction or for error of law on the face of the record."

It would seem clear that *certiorari* is pre-eminently a special revisionary discretionary remedy and in exercising the discretion, the High Court must, therefore, act upon recognized and established judicial principles. Encik Xavier has drawn my attention to, indeed I fully subscribe with the views expressed by Gajendragadkar J. in *Syed Yakoob* v. *Radhakrishna*[6] as follows —

"... the jurisdiction to issue a writ of *certiorari* is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as a result of the appreciation of evidence cannot be re-opened or questioned in writ of proceedings. An error of law which is apparent on the fact of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of *certiorari* can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of *certiorari*. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of *certiorari* on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of *certiorari* can be legitimately exercised." [See also [1969] 1 All E.R. 208 at page 223].

Encik Xavier also drew my attention to the case of *State of Orissa* v. *Murlidhar,*[7] where it is stated that an enquiry by "the Administrative Tribunal is

not governed by the strict and technical rules of the Evidence Act. Rule 7(2) of the Rules provides that in conducting the enquiry the Tribunal shall be guided by rules of equity and natural justice and shall not be bound by formal rules relating to procedure and evidence.

Encik Xavier then invited me to consider that the Industrial Court only adjudicates or arbitrates and it does not propound general principles of law. With respect, I entirely agree with him, and, looking at the Act, it seems clear that the court is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form — (section 27(5) of the Act).

Speaking of equity or equitable principles, it may be of academic interest to note that —

"early authorities refer to 'conscience', 'reason', and 'good faith' as the principles which guide the Court of Chancery, and the term 'equity' implies a system of law which is more consonant than the ordinary law with opinion current for the time being as to a just regulation of the mutual rights and duties of men living in a civilized society." (Words and Phrases Legally Defined, Volume II page 173).

It would seem that "from the beginning, the Court of Chancery acted on the maxim that 'equity follows the law' and in cases where the analogy clearly applied the ruling of law was adopted, however harsh it might be."

However, the present position appears to be as stated by Lord Cowper L.C. in *Dudley (Lord)* v. *Dudley*[8] as follows —

"Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it."

Speaking of 'substantial merits of the case without regard to technicalities and legal form', I am inclined to think that while the court need not be concerned with technicalities and legal form, it should not, however, be construed that the court is free to act in disobedience of the law and to depart from established principles. To echo what Lord Cowper in *Dudley (Lord)* v. *Dudley, supra* said, "Equity ... does not destroy the law, nor create it, but assist it."

Now, to begin with, I shall proceed to determine whether the court's finding that the applicants did not come within the meaning of public utility service disclosed an error of law apparent on the face of the record. In this regard, the court clearly arrived at the conclusion that it did after considering the facts before it. The court dealt quite at length with matters related to or connected with tunnel kiln or furnace section of the factory. On these facts, the court found that there was nothing unusual in the tunnel kiln section or any other section on the working of which the safety of the establishment or the workmen employed therein depended and held that the applicants were not a public utility service. With respect, this court finds no valid ground to interfere with the court's finding of fact. There were facts upon which the court could arrive at such a finding.

I shall now refer to the applicants' contention that there was an error of law on the face of the record when the court held that, in refusing to accept the workers when they wanted to resume work on February 16, 1974, the applicants had declared a lock-out. The answer to this question will depend on whether or not there was error of law apparent on the face of the record when the court held that by going on strike they were not without reasonable excuse and they did not therefore terminate their contracts of service.

The court found that the strike was not illegal. Such finding was made after considering the effect of certain provisions of the Act. The court had not erred in law in arriving at such finding. Section 40 of the Act imposes certain restrictions on strikes in public utility services and section 41 of the Act prohibits strikes under the circumstances provided in paragraphs (a) to (e). A strike in violation of either section is deemed to be illegal under section 42. Although the Act has not provided any specific provision sanctioning strike by workmen, it is abundantly clear from the provisions of the Act read in the light of the Trade Union Ordinance and section 8 of the Employment Ordinance that under the law in force in this country today, the workers have inherent rights to go on strike so long as they do not violate either section 40 or section 41 of the Act. Where there is a violation of either section, a strike is deemed to be illegal under section 42. The inherent rights of the workers to go on strike is clearly acknowledged by section 4 of the Act which confers rights upon workers to participate in lawful activities of a union, one of which is to organize strikes in furtherance of a trade dispute.

In the present case, the applicants do not, however, dispute that, under the Act, a worker is invested with such right. They do not even contend that the strike was illegal. What is really in issue here is whether a workman, by absenting himself continuously for more than two days for purposes of going on strike, legal though such strike may be, is deemed in law by reason of section 15(2) of the Employment Ordinance (I shall call "the Ordinance"), to have broken his contract of service. It is the applicants' contention that the workers by so absenting, committed a wilful breach of the conditions of their contracts of service and they were therefore entitled to terminate their services.

The relevant part of the court's award in that regard reads —

"To participate in a strike as a recognised trade union activity, over which right 'no person shall interfere', the court finds, is no neglect of duty on the part of the workmen to cause wilful breach of their contracts of employment. It must be observed that section 15(2) has been amended [under P.U.(A) 409/69] by inclusion of a new limb (b) to mean that no absent workman is deemed to have broken his contract so long as he has informed or attempted to inform his employer of the reasonable excuse for his absence. There is no doubt here that the company was informed of the excuse to be the strike by the union's letter dated December 31, 1973 (U.7). So long as the strike here is lawful in the sense of complying with the local statutory provisions the workmen's participation in it is 'reasonable excuse' and so the contracts of employ-

ment are not deemed to have been terminated. Therefore, the court finds that sections 16 and 15(2) have not been contravened."

On careful analysis of the court's finding I form the view that what the court in effect concluded was that (a) the workmen were entitled to cause wilful breach of their contracts since participation in a strike organised by a recognised trade union and in respect of which rights no person shall interfere constituted no neglect of duty on their part; (b) that the applicants were informed of the excuse for the absence and (c) that as the strike was lawful in the sense that it complied with local statutory provisions the workmen's participation in it was a reasonable excuse.

Before I embark upon a detailed examination of the true effect of the court's finding, let me pause for a moment to consider Willan C.J.'s judgment in *Wong Mook* v. *Wong Ying And 3 Others*.[9] It is conceded by Encik Xavier that sections 20 and 54(2) of the Trade Union Enactment, 1940, the provisions Willan C.J. considered in his judgment, are in *pari materia* with sections 21 and 66(b) respectively of the Trade Union Ordinance, 1959. He also conceded that section 53(iv) of the Labour Code is substantially similar to section 15(2) of the Employment Ordinance, 1955. Encik Xavier, however, argued that there was then no provision in the Employment Ordinance similar to section 8 of the Ordinance which reads — "Nothing in any contract of service shall in any manner restrict the right of any labourer who is a party to such contract to participate in the activities of a registered trade union."

To my mind, the true effect, indeed the purpose of section 8 of the Ordinance, is to prohibit any form of restriction to be embodied in the workman's contract of service. Fundamentally, it operates as a further acknowledgment of the inherent right of a workman to strike. I fail to see how it can be construed to mean that the right to strike is so unrestricted that under no circumstances can he be held to commit a breach of his contract of service. There is nothing in Willan's judgment to say that a workman had then no right to strike or participate in a strike organised by a trade union. The question of restriction in the contract of service of the workers was not in issue. Even if there had been provision similar to section 8 of the Ordinance then, it did not seem to be pertinent to the issue considered by Willan C.J. The learned judge did not determine the case on the basis that a labourer had no right to strike. The decision was in fact founded upon the basis that the strike was legal. At page 43 ofthe judgment, the learned judge, after referring to sections 20 and 54(2) of the Trade Union Enactment said —

"This clearly lays down that the provision of the local law relating to trade unions do not affect the agreements between complainants-respondents and the defendant-appellant in this case. Accordingly it is to the Labour Code that one must look to see what is the law regarding the breaking of such agreements."

In my view, the position is still the same today. The reason the learned Chief Justice arrived at the finding that he did is to be found at page 43 where he said —

"... The fact that of their own volition they absented themselves for the purpose of a strike cannot be held to come within the words 'reasonable excuse', otherwise it would mean that labourers could absent themselves from work for however long a strike remained in progress and claim that they had not broken their agreements."

In my judgment, the position has not been altered by the presence of section 8 of the Ordinance which, as I said earlier, is intended to prohibit or restrict the inclusion of some provisions that may produce the effects set out in (a), (b) and (c).

For this reason, I form the view that the judgment of Willan C.J. cannot be said to be outdated. It may, however, be distinguished from the present case.

In the instant case, it is my considered opinion that section 66(1)(b) of the Trade Union Ordinance operates and in the result this court shall have to examine the effect of section 15(2) of the Ordinance.

After careful analysis of section 15(2) of the Ordinance, it is, I think, elementary construction that where a labourer is, under the law, deemed to have broken his contract of service if he continuously absents himself for more than two days, all the relevant evidence shall have to be looked at to determine whether he comes within the exception, that in so absenting, he had either done so with leave of the employer or with reasonable excuse or had informed or attempted to inform his employer of the excuse for such absence. In making a finding, it is incumbent upon the court to take into account all relevant facts and the surrounding circumstances pertinent to the issue.

Section 15(2) has three limbs — two in section 15(2)(a) and one in section 15(2)(b). The first limb in section 15(2)(a), namely, leave of the employer is not relevant for purposes of this case. Before I proceed to consider the second limb, I propose to direct my mind to the court's finding that the applicants were informed of the excuse by the union's letter dated December 31, 1973 which stated that —"if by January 14, 1974 you fail to write to us your official letter according recognition and express your desire to commence negotiations, we will revert to industrial action and take note that this will be complete cessation of work."

First and foremost, it is pertinent to observe that the letter to the applicants was sent by the union and not by the workers. Section 15(2)(b) of the Ordinance must, I think, be construed to mean that the act of informing or attempting to inform must come from the labourer with whom the applicants have a contract of service. Even assuming I am wrong and it can be construed as sufficient information or attempt to transmit information where, as in the instant case, the union had written a letter and it was done on behalf of the workers, I still fail to see how the court could possibly hold that the workers informed or attempted to inform of "absence" within the meaning of section 15(2)(b). The letter made no disclosure on behalf of which workers the union was informing or attempting to inform the applicants. Furthermore, no reference was made which "such absence" the union was referring to. If at all, the letter amounted to nothing more than mere expression of indefinite intention.

The letter was sent some five weeks before the strike and it is revealed that the workers went on strike some three weeks after January 14, 1974. There was no reference specific or otherwise as to which of the applicants' labourer or labourers would cease work. If the letter was intended to refer to "such absence" within the meaning of section 15 of the Ordinance, it did not seem to contain any such thing. It lacked clarity. It was so vague that the applicants could not reasonably be expected, expressly or impliedly, to know how many of their workers would cease work and for what length of time the worker or workers would stay away. On the grounds stated in the award, it is my considered finding that there was disclosed an error of law on the face of the record. The question before the court was not essentially a question of fact but of mixed fact and law. It was an error of law, I think, to rely on irrelevant evidence or on no evidence. The letter from the union upon which the court seemed to have placed reliance, had been wrongly construed as to its effect and implications.

The view is, I think, strengthened by the presence of the words "such absence" in section 15(2)(b) which, in my view, signifies that the absence referred to must necessarily relate to some certain specific and definite absence for a duration of more than two days continuously by a particular labourer, with whom the employer has a contract of service. An information given or attempted to be given which merely sets out an intention at some future date of some workers whose identities are unknown to cease work for an indefinite duration of time, cannot, I think, in law, constitute the giving of information or attempt to giving of information within the meaning of section 15(2)(b) of the Ordinance.

With reference to the court's finding that it is no neglect of duty on the part of the workmen to cause wilful breach of their contracts of employment, Encik Xavier submitted that in view of section 8 of the Ordinance, the rights should be read into the contracts of service so as to render innocuous the provisions of section 66(b) of the Trade Union Ordinance, 1959. In other words, if the contract of employment permits a labourer to participate in a strike organised by a registered trade union, then participation in a strike so organised should be deemed "a reasonable excuse" under section 15(2)(a) of the Employment Ordinance. With all due respect, I am unable to see any merit in the argument. There was clearly an error of law on the face of the record. The court's finding in effect, amounts to providing complete immunity to workers from any form of disciplinary measure by the employer in the event of their causing wilful breach of their contracts of service. It means that the workers may go on strike whenever and for whatever duration of time they choose to, whether or not with reference to a particular employer or industry as they are merely exercising their rights over which no person shall interfere and do not therefore cause wilful breach of their contracts of service.

The court's finding that, so long as the strike is lawful in compliance with local statutory provisions, the workmen's participation in it is reasonable excuse and so the contracts of employment are not deemed to have been terminated, reveals yet another error of law apparent on the face of the record. Such finding necessarily embraces the idea that so long as the strike is lawful in compliance with the law, the workmen's participation in it is a reasonable excuse and their contracts of service cannot be deemed to have been terminated. To my mind, the court completely misdirected itself as to the true meaning, effect and implications of the relevant provisions. Whilst it is clear from the provisions of the Act, the Trade Union Ordinance and section 8 of the Ordinance that fundamentally the workmen have the right to strike so long as the strike does not contravene section 40 or section 41 of the Act, it cannot be said that the court can overlook the provisions of section 66(1)(b) of the Trade Union Ordinance and section 15(2) of the Ordinance in regard to contract of service between a labourer and his employer.

At this juncture, I pause to examine the meaning of the words "reasonable excuse". To my mind, it is an excuse which can be deemed by the court to be reasonable in the sense that a reasonable man would regard as an excuse, consistent with a reasonable standard of conduct according to reason. In *Re A Solicitor*[10] it was said that —

> "The word 'reasonable' has in law the *prima facie* meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know."

In *Rex* v. *Archdall & Roskruge, Ex parte Carrigan & Ex parte Brown*[11] it is stated that —

> "Reasonableness is relative, and must be proportioned to the circumstances of the case considered as a whole. The position cannot in broad principle be better stated than it was by Romer L.J. in *Glamorgan Coal Co.* v. *South Wales Miners' Federation*[12] in relation to a contract broken, in these words: — 'I respectfully agree with what Bowen L.J. said in the *Mogul* case [*Mogul S.S. Co.* v. *McGregor, Gow & Co.*[13]] when considering the difficulty that might arise whether there was sufficient justification or not; 'The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell'."

Latham C.J. in *Opera House Investment Pty., Ltd.* v. *Devon Buildings Pty. Ltd.*[14] speaking of the word "reasonable" said —

> "The word 'reasonable' has often been declared to mean 'reasonable in all the circumstances of the case.' The real question, in my opinion, is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transaction."

Looking at the relevant part of the court's award, I would therefore state what I hope to be the true legal position that the court ought, in the present case, to have proceeded to determine after finding that the strike was legal whether having regard to all the circumstances of this particular case — the strike was justified and that in the circumstances it constituted a reasonable excuse within the meaning of section 15(2)(a); or (b) whether a labourer had informed or attempted to inform his employer of the excuse for such absence.

I have dealt with (b). As for (a) above, it is apparent that the court not only erred in law in their approach but had misconstrued the proper effect and meaning of the law. Whether a strike was justified so as to constitute a reasonable excuse within the

meaning of section 15(2)(a) is a mixed question of fact and law.

In *S. Textile Mills Ltd.* v. *Workmen of Sadul Textile Mills And Another*,[15] it was held that "the question whether a strike in a mill was justified or not is not a mere a question of fact. It is a mixed question of fact and law." In that case, the High Court found that the Industrial Tribunal did not consider all its implications in considering justifiability of the strike. The High Court proceeded to hold that if there was an apparent error of law on the face of the record that would justify interference under Article 226 of the Constitution.

At the outset, the court correctly found that the workers' rights to strike had to be read into the contract of service and no person shall interfere with such rights and that the strike was legal but having made such finding, the court failed to consider whether the strike was justified having regard to all the relevant facts and circumstances.

In the instant case, it cannot be disputed that on the face of the record, there is clear evidence that the conduct of the applicants has left much to be desired. It failed to accord recognition and it also failed to commence negotiations. Nonethless, the matter had already been referred to the appropriate Ministry. The Ministry was fully aware of the whole history and background and indeed of the fact that a trade dispute had existed. The Ministry could not therefore have failed to appreciate the legal implications and indeed must be assumed to know that consequently the union and the workers might resort to industrial action and in all probability go on strike. As such the union could reasonably anticipate, that, not a mere possibility but in all probability, the Ministry shall exercise the power under the Act to refer the dispute to the court. The union, therefore, had no reason whatever to doubt the inevitability of such reference by the Minister. The court, however, failed to take into account this fact in its determination whether there was any justification for the workers to go on strike at that juncture. There was seemingly adequate provision in the Act for the union to seek recourse through legal means to resolve the dispute.

At this juncture, I take the liberty to refer to footnote 51 in Employees' Misconduct by Alfred Avins 1968, a quotation from a case which I have not been able to trace from the library which reads —

"*Smith, Stanis, Street & Co.* v. *Smith S.S. Workers' U.*, 1953 Lab. App. Cas. 31, 38, [1953] 1 Lab. L.J. 67 (Lab. App. Tri. Ind.). See *Vithabai Nana* v. *Bombay Fine Worsted Mfg.*, 1956 Lab. App. Cas. 386, 391 (Lab. App. Tri. Ind.): It is now well recognized that the use of the weapon of strike, which is now regarded as a legitimate weapon in the armoury of labour, is likely to lead to serious consequences, which may adversely affect not only the particular industry concerned, including labour, but also the interests of the country; and in this respect, it makes no difference to the dangers involved, whether the strike resorted to is technically rendered illegal by law or otherwise. The use of the weapon of strike has, therefore, been generally deprecated, except when such use is forced on labour when they have a *bona fide* grievance and have no other effective method open to them to have their grievance remedied."

In consideration, it is my view that before making the award, it was not only essential for the court to consider the workers' rights to strike, the legality of such strike but it must also determine whether in fact there was justification for the strike, taking into account, amongst other things, the public interest, the financial implications, the interest of the industry, the effect of such award on the economy of the country and the safety of the industry or the factory concerned. The court might have had good reason to say that for the applicants to give notice to the workers to resume work within a period of 48 hours otherwise their services would be terminated was an unfair labour practice, nonetheless, it failed to consider the fact that the applicants, faced with a strike for an indefinite period, did not seem to have any other alternative but to act speedily and do something to protect the industry and the safety of its property and equipment. It is in this respect that the question of the nature of the industry, the equipment used, the presence of the tunnel kiln which could endanger those who were still working if not properly and adequately attended to, shall have to be considered. Even though the court quite correctly held that the industry did not come within the meaning of public utility service, nevertheless, there was evidence before the court to the effect that the tunnel kiln, sensitive to high and low temperatures, had to be controlled by properly trained firemen rotating in three shifts a day working under the applicants' kiln supervisors to ensure right temperature reading. The tunnel kiln section was the heart of the factory. Apart from that, there were three other main sections all requiring supervisors to see the different stages of producing fire bricks and the whole process was sophisticated and complicated. Due to sudden stoppage of work by so many workers, it became evident that the various equipment could not be adequately attended to and might therefore lead to danger that could affect the safety not only of the workers therein but also the whole equipment. The applicants, therefore acted lawfully when they gave notice to the striking workers to return to work or else their services would be terminated. In that event, they were right in refusing to accept the workers when they wanted to resume work.

The fact that the court had not considered the full effect and implications of the various factors and the relevant circumstances surrounding the strike, shows that they had erred in law. The error apparent on the face of the record justifying interference by this court.

I would therefore allow the application and order that the award of the court be removed to this court and I do hereby quash the court's award.

As regards costs, I am firmly of the view that the dispute was substantially attributable to the conduct of the applicants in their dealings with the respondents prior to the strike. I do not, therefore consider it appropriate that they should be awarded costs. In my judgment each party shall bear its own costs in these proceedings.

Order accordingly.

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